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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRET ROBERT OSBORN, MICHAEL)	Case No. C 04-00336 JSW
PFAFF, KATHLEEN ANN PFAFF AND)	
MARTY GAYLE OSBORN, on behalf of)	CLASS AND REPRESENTATIVE ACTION
themselves, the general public, and all others)	
similarly situated,)	FIRST AMENDED COMPLAINT FOR
)	VIOLATION OF CALIFORNIA
Plaintiffs,)	LABOR CODE SECTIONS 203, 221,
)	223, 400-410, AND CALIFORNIA
vs.)	BUSINESS AND PROFESSIONS CODE
)	SECTION 17200, ET SEQ.
EMC CORPORATION, and Does 1 through)	
50,)	
)	
Defendants.)	

Comes now Plaintiffs BRET ROBERT OSBORN, MICHAEL PFAFF, KATHLEEN ANN PFAFF and MARTY GAYLE OSBORN on behalf of themselves, the general public, and all others similarly situated, and alleges as follows:

JURISDICTION

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2
3 1. This Court has jurisdiction over this class action for violation of the California
4 Labor Code and Business and Professions Code because this is a class action, the individual
5 claims exceed \$75,000, the cause of action arose within the venue of this court, and there is
6 diversity of citizenship between the parties.

PARTIES

7
8 2. Plaintiffs BRET ROBERT OSBORN and MICHAEL PFAFF, (hereinafter also
9 referred to as the "Plaintiffs" and/or "Named Plaintiffs") at all relevant times herein was
10 employed by Defendant EMC CORPORATION, as a sales representative pursuant to
11 successive one year written compensation plans.

12
13 3. Plaintiffs KATHLEEN ANN PFAFF AND MARTY GAYLE OSBORN is each
14 the spouse of an EMC CORPORATION employee who was charged back commissions without
15 the spouse's written consent, and are not themselves EMC CORPORATION employees nor are
16 they signatory to any agreements with EMC CORPORATION, and bring this action for their
17 own benefit, the benefit of all EMC CORPORATION employee spouses and for the benefit of
18 the general public.

19 4. Defendant EMC CORPORATION (hereinafter also referred to as "Defendant")
20 is a foreign corporation engaged in the business of providing information storage systems,
21 software, networks, and related services.

22
23 5. Defendant is individually, jointly and severally liable as the employer of the
24 Named Plaintiffs and each Plaintiff class member because each Defendant directly or indirectly,
25 or through an agent or any other person, employed or exercised control over the wages, hours,
or working conditions of Plaintiffs.

1 6. Unless otherwise alleged in this complaint, Plaintiffs are informed and believe,
2 and on that basis allege, that at all times material, each Defendant was the agent and employee
3 of its codefendants, and in doing the things alleged in this complaint was acting within the
4 course and scope of that agency and employment.

5 7. The true names and capacities of defendants sued as Does are unknown to
6 Plaintiffs, but Plaintiffs will amend their complaint when and if the true names of said
7 defendants become known to them. Plaintiffs are informed and believe and thereon allege that
8 each of the defendants sued herein as a Doe is responsible in some manner for the events and
9 happenings referred to herein and any reference to "Defendant" or "Defendants" shall mean
10 "Defendants and each of them".
11

12 **CLASS AND REPRESENTATIVE ACTION ALLEGATIONS**

13 8. Plaintiffs bring this action on their own behalf, on behalf of the general public
14 and on behalf of the class of all persons similarly situated.

15 9. The class is defined as all sales representatives subject to Defendant's
16 chargeback policy, including but not limited to, all job titles eligible for commissions and
17 subject to chargebacks who were employed by Defendant within the State of California within
18 four years of the filing of this complaint until the date of entry of judgment after trial.

19 10. Plaintiffs are informed and believe that there are over 100 people within the
20 class, and this class is so numerous that joinder is impractical.

21 11. There is a well-defined community of interest in the questions of law and fact
22 affecting the class as a whole. According to Defendant's policy, class members were charged
23 back for earned and paid commissions, and Plaintiffs allege this policy violates the provisions
24
25

1 of Cal. Lab. Code § 221, the public policy articulated in Cal. Lab. Code §§ 400-410, the Cal.
2 Bus. & Prof. Code §17200.

3 12. Common questions of law and fact apply to all class members as stated herein.
4

5 **FACTUAL ALLEGATIONS**
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7

8 13. Defendant claims to be the world leader in information storage systems,
9 software, networks, and services and the only company 100% dedicated to automated
10 networked storage.
11

12 14. Plaintiffs and each Plaintiff class member earned wages for selling Defendant's
13 services and applicable products. These wages were earned at the time of sale. The sale
14 occurred when a legally enforceable contract was entered into between the customer and
15 Defendant.

16 15. Defendant would approve the credit worthiness of the customer, before entering
17 into the contract for service or materials. Typically, Defendant would pay 50% of the
18 commission in the next paycheck immediately after Defendant approved and accepted the
19 contract. The remainder of the commission is typically paid in the next fiscal month.

20 Upon execution of the contract, Plaintiff and each class members earns wages in the form of
21 commissions. Plaintiffs and each class member had or have no further duties with regards to
22 the service or sale upon activation.
23

24 16. If after 90 days, invoices are still outstanding to the customer, then the Defendant
25 charges back the commissions paid. If the invoices are eventually paid, only 80% of the base

1 commission only is returned to the sales representative without accelerators and other bonuses
2 originally paid.

3 17. Defendant subtracts wages already paid to Plaintiffs and Plaintiff class members
4 from wages due in order to recover these chargebacks.

5 18. Plaintiffs pay state and federal wage type taxes on all money earned as
6 commission.

7 19. Defendant does not reimburse for taxes paid from charged back wages.
8
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12 **FIRST CAUSE OF ACTION**
13 **Unlawful Wage Deductions**
(Cal. Lab. Code §§ 221, 300 & 400-410)

14 20. Cal. Lab. Code § 221, entitled "Collection or receipt of wages previously
15 paid," provides: "It shall be unlawful for any employer to collect or receive from an employee
16 any part of wages theretofore paid by said employer to said employee."

17 21. Cal. Lab. Code § 300(b) states that : No assignment of wages, earned or
18 to be earned, is valid unless all of the following conditions are satisfied: (1) The assignment is
19 contained in a separate written instrument, signed by the person by whom the wages or salary
20 have been earned or are to be earned, and identifying specifically the transaction to which the
21 assignment relates; (2) Where the assignment is made by a married person, the written consent
22 of the spouse of the person making the assignment is attached to the assignment and (6) A
23 copy of the assignment and of the written statement provided for in paragraphs (2), (4), and (5),
24
25

1 authenticated by a notary public, is filed with the employer, accompanied by an itemized
2 statement of the amount then due to the assignee.

3 22. Cal. Lab. Code § 300(h) further provides that: "No assignment of wages
4 is valid unless at the time of the making thereof, such wages or salary have been earned, except
5 for necessities of life and then only to the person or persons furnishing such necessities of life
6 directly and then only for the amount needed to furnish such necessities."

7 Defendant did not have a separate notarized assignment executed at the time the wages were
8 due allowing for chargebacks.

9 23. Before making the deductions for any married person, Defendant did not
10 have the written consent of the spouse of the person making the assignment attached to the
11 assignment.
12

13 24. Cal. Lab. Code § 300 also provides that such assignment must be
14 revocable at will.

15 25. Cal. Lab. Code § 400- 410 inclusive prohibits the investment of
16 employee paychecks in the business risk of the employer.

17 26. Cal. Lab. Code § 2802(a) states that: An employer shall indemnify his or
18 her employee for all necessary expenditures or losses incurred by the employee in direct
19 consequence of the discharge of his or her duties, or of his or her obedience to the directions of
20 the employer, even though unlawful, unless the employee, at the time of obeying the directions,
21 believed them to be unlawful.
22

23 27. Once earned, unpaid wages became property to which the plaintiff was
24 entitled. Failure to promptly pay those wages is unlawful and thus an unfair business practice.
25 Therefore, Defendant could be legally compelled to restore unpaid wages to Plaintiffs.

1 The reduction of future wages by amounts "charged back" constitutes an unlawful payroll
 2 deduction contrary to the express prohibition expressed in Quillian v. Lion Oil Company (1979)
 3 96 Cal. App. 3d 156.

4 28. By charging back commissions, Defendant impermissibly placed the
 5 business risk of non-payment on the employee.

6 29. Defendant did not reimburse Plaintiffs for any taxes taken out of the
 7 returned monies.

8 30. By the conduct described above, Defendant, has unlawfully collected or
 9 received from Plaintiffs and Plaintiff class members a part of wages theretofore paid by an
 10 employer to its employees.

11 31. Therefore, Plaintiffs and Plaintiff Class members demand return of all
 12 wages unlawfully deducted from sales representatives employed by Defendant, within the State
 13 of California within four years of the filing of this complaint until the date of entry of judgment
 14 after trial, and reversal of all commission chargebacks and repayment of any subsequent
 15 reduction of commission as a result of chargebacks.

16 **SECOND CAUSE OF ACTION**

17 **Unjust Enrichment from Unconscionable Charge-Backs** 18 **(Cal. Civ. Code §§ 1670.5, Cal. Bus. & Prof. Code § 17200)**

19 32. Plaintiffs incorporate by reference all paragraphs set forth above in this
 20 Complaint, as if fully set forth herein.

21 33. Plaintiffs and each Plaintiff class member were promised wages in the
 22 form of commissions for sales to customers.
 23
 24
 25

1 34. If a customer is pays its invoices late, but eventually pays them, the
2 Defendant does not re-instate the full commissions earned at the time of the original sale.
3 Defendant derives an economic benefit from the sale, even if the customer is a slow pay.

4 35. Cal. Civ. Code § 1670.5 states that “If the court as a matter of law finds
5 the contract or any clause of the contract to have been unconscionable at the time it was made
6 the court may refuse to enforce the contract, or it may enforce the remainder of the contract
7 without the unconscionable clause, or it may so limit the application of any unconscionable
8 clause as to avoid any unconscionable result.”

9 36. Plaintiffs and Plaintiff class members are non-union employees and
10 Defendant is a wealthy, multi-billion dollar commercial enterprise with the power and resources
11 to hire counsel and demands a single policy of compensation for all sales employees, a take it or
12 leave it contract, and thus have unequal bargaining power to negotiate terms and conditions of
13 employment with its employees.

14 37. The “chargeback” provision of the corporate policy so grossly shifts the
15 business risk on to the employee without any ownership interest that the contract is
16 unconscionable.

17 38. Wages were earned at the time of the sale, and once earned, unpaid wages
18 became property to which the Plaintiffs and each Plaintiff class member was entitled.
19 Failure to promptly pay those wages without rebate or deduction unjustly enriches Defendants,
20 is unlawful and thus an unfair business practice.

21 39. Therefore, Plaintiffs and Plaintiff Class members demand defendant be
22 compelled to restore unpaid wages to plaintiffs and/or the value of the services rendered by the
23 amount of original commission rate, with all accelerators and bonuses restored retroactively
24
25

1 Defendant.

2
3 **THIRD CAUSE OF ACTION**
4 **Waiting Penalties**
5 (CAL. LAB. CODE §§ 203, 204)

6 40. Plaintiffs hereby incorporate each and every allegation contained above, and
7 reallege said allegations as if fully set forth herein.

8 41. CAL. LAB. CODE § 204 provides that "All wages, other than those mentioned in
9 §§ 201, 202, 204.1, or 204.2, earned by any person in any employment are due and payable
10 twice during each calendar month, on days designated in advance by the employer as the
11 regular paydays."

12 42. CAL. LAB. CODE § 203 states: "If an employer willfully fails to pay, without
13 abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of
14 an employee who is discharged or who quits, the wages of the employee shall continue as a
15 penalty from the due date thereof at the same rate until paid or until an action therefore is
16 commenced; but the wages shall not continue for more than 30 days."

17 43. Plaintiffs and many Plaintiff class members are due waiting penalties for not
18 making restitution at the time of termination from employment of all chargebacks taken from
19 their pay.

20 44. Therefore, Plaintiffs demand thirty days of pay as a penalty for not paying all
21 wages due at time of termination for all employees who terminated employment within three
22 years of the filing of this complaint until the date of entry of judgment after trial as provided by
23 CAL. LAB. CODE § 203.
24
25

FOURTH CAUSE OF ACTION
Private Attorneys General Act of 2004
(CAL. LAB. CODE §§ 1197, 2699)

45. Plaintiffs herein repeat and re-alleges each and every paragraph above as though fully set forth herein.

46. CAL. LAB. CODE § 2699 (a), also known as the Labor Code Private Attorneys General Act of 2004, states:

Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.

47. Plaintiffs are an "aggrieved employee" as that term is defined in the Labor Code Private Attorneys General Act of 2004 because they are persons who were employed by the alleged violator and against whom one or more of the alleged violations was committed.

48. Plaintiff therefore brings this action on behalf of themselves and other current and former employees.

49. CAL. LAB. CODE § 1197.1 (f) further states:

Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs. Nothing in this section shall operate to limit an employee's right to pursue other remedies available under state or federal law, either separately or concurrently with an action taken under this section.

50. By the conduct described above, Defendants have violated the provisions of §§ 221 and 203 of the CAL. LAB. CODE and the Orders of the Industrial Welfare Commission relating to the payment of compensation and charging back compensation earned and paid.

1 51. Therefore, Plaintiffs demand payment for all current or former employees whom
2 were unlawfully charged back wages in violation to California Labor Code §§ 203

3
4 **FIFTH CAUSE OF ACTION**
5 Unfair Competition Law
6 (CAL. BUS. & PROF. CODE § 17200 *et seq.*)

7 52. Plaintiffs incorporate by reference all paragraphs set forth above in this
8 Complaint, as if fully set forth herein.

9 53. CAL. BUS. & PROF. CODE § 17200, provides: “As used in this chapter, unfair
10 competition shall mean and include any unlawful or fraudulent business act or practice and
11 unfair, deceptive, untrue or misleading advertising an any act prohibited by Chapter 1
12 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions
13 Code.”

14 54. Defendant has violated the provisions of the California Labor Code by for
15 taking money from the paychecks in the form of chargebacks and by including an unlawful
16 non-competition provision in its employment agreement.

17 55. By the conduct described above, Defendant has also violated the provisions of
18 the Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.* for which this Court
19 should issue equitable and injunctive relief pursuant to CAL. BUS. & PROF. CODE § 17203,
20 including restitution of wages wrongfully withheld or labor taken without proper
21 compensation.
22

23 56. Unless enjoined, Defendant will continue to deduct commission earned for
24 canceled service contracts in the form of “chargebacks” against future commissions, even when
25 the Defendant collects some portion under the contract.

1 number of each remaining unpaid class member and the amount charged back,
2 or, if the Labor Commissioner will not accept these funds, then to the National
3 Employment Lawyers Association (a not for profit organization located in San
4 Francisco dedicated to promoting the employment rights of workers), in the
5 manner provided for by California Code of Civil Procedure Section 384;

6 (f) Interest;

7 (g) Attorney fees and costs as provided by statute and/or applicable case law; and

8 (h) Such other relief as the Court deems just and proper.

9 Dated this ___th day of July, 2004.

10 THIERMAN LAW FIRM

11
12 By: _____/S/_____
13 Mark R. Thierman
14 Micheline N. Fairbank

15 HOFFMAN & LAZEAR

16 By: _____/S/_____
17 H. Tim Hoffman
18
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4 Francisco dedicated to promoting the employment rights of workers), in the
5 manner provided for by California Code of Civil Procedure Section 384;

6 (f) Interest;

7 (g) Attorney fees and costs as provided by statute and/or applicable case law; and

8 (h) Such other relief as the Court deems just and proper.

9 Dated this 20th day of July, 2004.

10 THIERMAN LAW FIRM

11
12 By: _____/S/_____
13 Mark R. Thierman
14 Micheline N. Fairbank

15 HOFFMAN & LAZEAR

16 By: _____/S/_____
17 H. Tim Hoffman